Petition

No. 81-456

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

C. JOHN PRINCE,
Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE SECOND & ELEVENTH JUDICIAL DISTRICTS,
Respondent.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the Second Department

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QUESTIONS PRESENTED

1. Were petitioner's Constitutional rights secured by the Fifth Amendment violated by compelling him to testify at a professional disciplinary proceeding?

2. Were petitioner's Constitutional rights secured by the Fourteenth Amendment violated by threats made by the Referee and Prosecutor to compel petitioner to testify at the disciplinary proceeding?

3. Were petitioner's Constitutional rights secured by the Fourteenth Amendment violated by finding him guilty of professional misconduct for engaging in a commercial transaction, without any evidence of overreaching or unjust enrichment?

4. Were petitioner's Constitution rights secured by the Fourteenth Amendment violated by finding him guilty of professional misconduct for a small charge to an attorney for professional services to the latter, at the latter's request and instance?

5. Were petitioner's Constitutional rights secured by the Fourteenth Amendment violated by finding him guilty of commingling the funds of a client without notice or evidence of the identity of the client whose funds were commingled?

6. Were petitioner's Constitutional rights secured by the Fourteenth Amendment violated by finding him guilty of failing to cooperate with the Grievance Committee without the complainant—counsel for the Grievance Committee—testifying?

7. Were petitioner's Constitutional rights secured by the Fourteenth Amendment violated by virtue of the conflict of interest of the attorney for the Grievance Committee who was also the complaining witness against him on one of the charges?

8. Were petitioner's Constitutional rights secured by the Fourteenth Amendment violated by failure of the hear-

ing referee to disqualify himself, when it developed at the hearing that one witness accused the Referee of misconduct in connection with one of the transactions giving rise to the charges herein?

9. Were petitioner's Constitutional rights secured by the Fourteenth Amendment violated by finding him guilty of unjust enrichment on charges of committing usury, without any amendment of the charges?

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No.

C. JOHN PRINCE,

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vs.

GRIEVANCE COMMITTEE FOR THE SECOND & ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE SECOND DEPARTMENT

Petitioner respectfully petitions for a writ of certiorari to review the order entered on the 1st day of June, 1981 in the Appellate Division, Second Department, disbarring petitioner from the practice of law in the State of New York, effective June 1st, 1981 and striking his name from the Roll of Attorneys and Counselors at Law. The order of disbarment prohibits him from practicing law or holding himself out as an attorney and "from giving another an opinion as to the law or its application, or any advice in relation thereto." On the 7th day of July, 1981, the New York Court of Appeals denied petitioner leave to appeal to the New York Court of Appeals.

OPINION AND ORDER BELOW

The order of the Appellate Division of the Supreme Court of the State of New York for the Second Department entered the 1st day of June, 1981, disbarred appellant and further, prohibited him "from giving another an opinion as to the law or its application, or any advice in relation thereto." On the 7th day of July, 1981, the New York Court of Appeals denied petitioner leave to appeal to that Court. Neither Court wrote a formal opinion.

JURISDICTION

The jurisdiction of the Supreme Court is invoked to review the order of disbarment of the Appellate Division of the Supreme Court of the State of New York for the Second Department pursuant to 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Petitioner is a sixty eight year old attorney, with forty two years standing, as a member of the bar of the State of New York, when, suddenly, he was faced with two frivolous complaints made to the Grievance Committee of the Appellate Division, Second Department, which maintains a permanent staff to investigate and prosecute charges of professional misconduct. The two complaints against petitioner originating from a client and from an attorney.

The first charge grew out of petitioner's representation of James and Lottie Gilbert, who claimed that James Gilbert had been part owner, with his deceased uncle and aunt, of a one family home, 114-62 199th Street, St. Albans, New York. Petitioner brought an action on their behalf against the Public Administrator, who represented the estates of the deceaseds, to impress a fifty percent trust on the property. The claim was that somehow, James

Gilbert's name had been improperly removed from the deed. The claim was settled during trial for a twenty five percent interest for James Gilbert in the net proceeds of a public sale of the property, which came to some $1,913.95, after expenses and liens calculated by the Public Administrator.

James and Lottie Gilbert then bid the property at public auction. Their bid was accepted and they entered contract with the Public Administrator to purchase the home in which they had previously lived, with their deceased aunt and uncle, the same 114-62 199th Street. They put down a deposit of $3,000, with a balance of $19,890 payable on closing. However, they were unable to secure a mortgage to finance the balance, because the property was in such state of disrepair, that a certificate of occupancy could not be issued, thereby disqualifying them from securing mortgage money. Therefore, at closing, these clients stood to lose their deposit. It is at this point that petitioner agreed to advance the balance of the purchase price, $19,890, and took title in the name of a corporation owned by his wife, as security. Petitioner then had his construction company put the house into habitable condition, so that a certificate of occupancy could be issued. The reasonable value of the repairs was $11,200. Stairways had been ripped away. A new kitchen was required, etc. With the issuance of a certificate, mortgage money became available to the clients. The mortgage money was used to reimburse petitioner for the $19,890 of capital that he risked in taking title to the property and to compensate him for the $11,200 in extensive repairs that had to be done to the building. Apparently, the clients felt that they had been overcharged. Mr. Casella investigated this complaint and charged petitioner, *inter alia*, with usury.

The second charge was made by another attorney, George Sassower. Petitioner was an officer in a corporation that owned several parcels of property and the buildings

thereon had been condemned by the City of New York. Sassower represented a client who held a mortgage on the property. A condemnation award of twelve thousand dollars was made by the City. Petitioner and Sassower agreed that Sassower would receive eight thousand dollars in satisfaction of his client's claim and petitioner would receive the balance. It was agreed that each lawyer would furnish W. Bernard Richland, the Corporation Counsel of the City of New York, with the necessary documentation to secure a release of the check. Both lawyers made numerous trips to the office of the Corporation Counsel, with the necessary documentation. However, each time, the Corporation Counsel found fault with the papers until finally, Mr. Sassower refused to continue with the charade. It was ultimately agreed that petitioner would do the necessary work to obtain the required documentation from both Mr. Sassower's client and his own corporation. Petitioner did the work and when he secured payment, he forwarded to Mr. Sassower a check in the amount of $7,725.00, charging him $275.00 for services rendered. Sassower returned the check, instituted litigation and reported the matter to the Grievance Committee. Gary Casella, the Grievance Committee prosecutor, undoubtedly hungry for business, charged petitioner with converting escrow funds, although petitioner never entered into an escrow agreement with Sassower.

In the course of the investigation of this claim, Casella was guilty of harassment, insisting upon making a general examination of petitioner's books and records in clear violation of his civil rights secured by 42 U.S.C. 1983 and even went so far as to subpoena all of petitioner's bank records. In addition, Casella insisted that petitioner supply evidence against himself, not only in respect to these claims, but in respect to his general practice and went so far as to subpoena petitioner and all of petitioner's bank records. Petitioner, however, in the spirit of cooperation,

turned over his records to Mr. Casella, which Mr. Casella misplaced or lost.

Mr. Casella then promulgated two charges of his own against petitioner. He charged petitioner with commingling his personal funds, with those of his clients and he also charged petitioner with refusing to cooperate with him in the course of the investigation. It is self-evident that the only witness that could possibly support this fourth charge would be Casella. Nevertheless, Casella refused to disqualify himself as prosecutor and likewise, refused to testify at the hearing. As for the charge of commingling his funds with those of his clients, petitioner still has not been put on notice which of his clients' funds were commingled, since it does not appear in the charges and no testimony of such commingling was ever developed. Petitioner stands convicted on this third commingling charge, promulgated by Mr. Casella, without client complaint, without any disclosure either in the charges or on the hearing as to the identity of any client whose funds were supposed to be commingled.

The fourth charge was likewise promulgated by Mr. Casella. It accused petitioner of failing "to cooperate with the Grievance Committee for the Second and Eleventh Judicial Districts in the legitimate investigation of complaints of professional misconduct made against him," for failing to produce all of his bank statements from December 1974 to date to afford Casella opportunity to make a general examination of his finances and for failure to produce certain closing statements. However, Mr. Casella failed to disqualify himself as prosecutor, by virtue of the fact that he was the only witness against petitioner on this fourth charge. At the hearing, Mr. Casella failed to testify and therefore there was no evidence produced, whatsoever, to support the fourth charge. However, Mr. Casella did make many unsworn allegations during the course of his examination of petitioner—who was compell-

ed to testify—in the form of childish exchanges with petitioner, including name calling.

As hereinbefore pointed out, W. Bernard Richland, former New York City Corporation Counsel was appointed as Referee to preside over the presentation of Mr. Casella's case and to report his findings to the Appellate Division. A brief discussion of the evidence would seem to be appropriate.

* * *

James and Lottie Gilbert testified that they had a claim against the Estate of James' deceased uncle and aunt, for an interest in the one single family home known as 114-62 199th Street, St. Albans, New York. Particularly, James made a claim difficult to prove—that his name had been removed from the deed. The Public Administrator represented the estate. The matter was settled during trial. James Gilbert was to receive twenty-five percent of the net proceeds of sale of the property at public auction. The Gilberts entered a bid of $22,100 for the house, which was accepted. The reason so low a bid was accepted was the disrepair into which the house had fallen. They entered into contract with the Public Administrator and posted a three thousand dollar deposit toward the purchase price of this property, which was in such a state of disrepair, that mortgage money was not available for the balance of the $19,890 purchase price. It is in this climate that at closing, the Gilberts were unable to come up with the balance of the purchase price. Petitioner, active in the real estate and contracting businesses, offered to take title to property in the name of a corporation, in which he was a principal, as security and in consideration for which, he paid the $19,890 balance and put the property into a state of repair so that it would become inhabitable. The clients agreed, since any other path would result in their loss of their $3,000 deposit and loss of opportunity to purchase the property.

Petitioner performed repair services on the structure in order to make it habitable in the reasonable value of $11,200 which he advanced, so that the Gilberts would be able to secure a mortgage. Upon securing a mortgage, the mortgage money was paid to petitioner to compensate him for the $19,890 dollars he risked in purchasing the property and the $11,200 he advanced in extensive repairs he made to the house. Referee Richland found petitioner guilty of unjust enrichment. However, a reading of Richland's report to the Court reflects the latter's failure to discuss the fact that petitioner advanced $19,890 toward the purchase price and $11,200 to repair the house. Thus, the report of Referee Richland handles the facts in this transaction, in less than an honest way. Indeed, no expert witness testified whether the profit allegedly earned by petitioner was in fact, excessive.

As for advising his clients of a possible conflict of interest, the record at the hearing was clear that petitioner warned Mrs. Gilbert of her right to engage another counsel, but she declined to do so, undoubtedly to save the additional expense of new counsel:

> "Q. Now, Mrs. Gilbert, in your purchase of the house from the Public Administrator did Mr. Prince ever suggest to you that you retain another attorney to represent you?
>
> A. Yes, he did. He said after a period of time. He said we will, we raised no objection to him about anything at that time because we would—we were depending upon him. He said, if you don't like, I'm going to get another attorney, or you can get another attorney.
>
> Q. When was that?
>
> A. He said it a couple of times. So I said, 'You're our attorney .'" (P. 94-5)

Referee Richland made findings that petitioner was guilty of unjust enrichment in earning too much profit on the $32,090 he risked, without indicating how much profit he would consider to be fair. No evidence was offered to substantiate the charge petitioner made a usurious loan, as charged in the specifications. Indeed, it was sheer perversion for Richland to condemn petitioner, when he went over and beyond his duty as a lawyer, by providing the necessary financing for a client in danger of losing a deposit and investing risk capital on behalf of a client, to save their home, which they still inhabit to this day. Petitioner's reward for risking his capital on behalf of a client—some $32,090—is disbarment. It is ironic that had almost any other lawyer represented the Gilberts, they would have lost their deposit and opportunity to buy their home for lack of capital.

As for the second charge, George Sassower proved to be a reluctant witness. He testified that he represented the mortgagee on property belonging to petitioner's corporation, which had been condemned by the City of New York. It was informally agreed that the mortgagee would be paid $8,000 from the condemnation award, provided that Mr. Sassower prepare the necessary papers required from his client. The Referee, Mr. Richland, was the Corporation Counsel at the time. According to Mr. Sassower, he and petitioner made numerous visits to the office headed by the Referee at the time, with the necessary papers, with the same result on each occasion, the papers being rejected each time for some frivolous and hyper-technical reason. According to Sassower, "every time we went down to the City of New York, they found something else wrong" (114). Sassower refused to keep returning to try appease bureaucratic red tape, and delegated the task to petitioner to secure the necessary papers from his client, the mortgagee, including the satisfaction of mortgage, stipulations of discontinuance and satisfaction of lis pendens. When

finally petitioner was able to secure payment, petitioner forwarded to Mr. Sassower a check in the sum of $7,725, deducting $275.00 as a legal fee for performing the work that Mr. Sassower requested him to do. Sassower, however, returned the check to petitioner.

Petitioner moved for the Referee to disqualify himself, by virtue of the testimony of Sassower, that came without pre-hearing warning to petitioner, shifting the blame to the Referee, when he held the office of Corporation Counsel, rather than petitioner. The Referee denied the motion, recommending that petitioner not be found guilty on the second charge, making a bitter, scathing attack upon the character of petitioner and Mr. Sassower, the latter, undoubtedly by reason of his testimony criticizing Mr. Richland in the operation of his public office.

As for charge number three brought by Mr. Casella, accusing petitioner of commingling client's funds, not an iota of evidence was produced that appellant commingled any client's funds with his own. Indeed, no client ever complained of such commingling and to this day, petitioner has never been afforded notice of what client's funds have been commingled.

No offer was made to prove charges three and four, to wit, commingling clients' funds and refusal to cooperate with the investigation, before Mr. Casella rested:

> "THE REFEREE: Let's move on. Does that complete your case, Mr. Casella?
>
> MR. CASELLA: Yes, except I would like to reserve my rights to produce additional evidence if I feel it's warranted.
>
> REFEREE: Let's see what it amounts to when the time comes.
>
> MR. CASELLA: Right." (250-1)

With full confidence that Casella had made out no case against him, petitioner declined to testify:

"MR. GREEN: At this juncture, sir, the respondent would rest. He's not going to testify.

THE REFEREE: I beg pardon?

MR. GREEN: At this juncture the respondent will rest.

MR. CASELLA: Please not for the record. It's been the posture of the Appellate Division, they generally would like to have the benefit of hearing the respondent testify in these proceedings.

THE REFEREE: There is no way in which I can tell him." (251)

The Referee's reticence, however, rapidly changed to accommodate the needs of Mr. Casella:

"MR. CASELLA: I understand that I would just like to note that for the record.

THE REFEREE: Then the case is closed.

MR. CASELLA: I have additional evidence.

THE REFEREE: Oh, you do?

MR. CASELLA: Yes, I do.

THE REFEREE: Of course, you understand, Mr. Casella you are free to call any witnesses, *including the respondent.*

MR. CASELLA: I understand that, and I'm considering that." (251-2)

Mr. Casella then introduced into evidence several documents and then called petitioner as his witness:

"MR. CASELLA: I would like to call the respondent as a witness." (254)

Petitioner was then compelled to testify as a witness against himself. He testified that he fully cooperated with the investigation, contrary to Mr. Casella's fourth charge against him, which touched off Mr. Casella to make unsworn statements and to villify and abuse petitioner:

"MR. CASELLA: If I may, Mr. Richland, Mr. Prince is putting me in a position that I'm concealing evidence. He never gave me records. He doesn't have common sense.

THE WITNESS: You said at a quarter after 3, it was the lateness of the hour. You would mail it back to me.

MR. CASELLA: I have no idea what you're speaking of.

THE REFEREE: Let's see if we can limit ourselves to asking questions and responding to questions.

MR. CASELLA: This gentleman has persisted in making personal accusations against me throughout the entire proceedings before the Appellate Division and he's—I think there is a time it should be stopped. Either he's going to testify as to what happened and beyond that he shouldn't be making all these personal charges." (352)

Mr. Casella never testified. Therefore, the record stands uncontradicted that petitioner turned records over to him, which he misplaced or lost.

REPORT OF REFEREE RICHLAND

Charge One

Referee Richland found "that (petitioner) took advantage of two uneducated working people, that he enriched himself and family-owned corporate entities which he controlled, to the detriment of his clients, that he overreached his clients, defrauded them and engaged in a gross conflict of interest in his dealings with them." despite the fact that Casella did not call a single witness to support such conclusion that the services performed by petitioner in financing and rehabilitating the home were commercially excessive.

Charge Two

Referee Richland found that charge two had not been established to the extent that "proof of it rests upon conflicting testimony by two persons (Sassower and petitioner) whose comparative lack of credibility is approximately equal and therefore cannot be regarded as established," the referee blowing up at Sassower because the latter criticized his management of the corporation counsel's office.

Charge Three

Referee Richland found petitioner guilty of commingling personal and escrow funds of clients, without any evidence that any client's funds were ever in the escrow account at the time in question and without any complaint by a client that his funds had been commingled.

Charge Four

The Referee found that petitioner failed to cooperate with the Grievance Committee, despite a lack of any testimony by the prosecutor, Gary L. Casella, the complainant, who accused him of such alleged defalcation.

Motion to Recuse

The Referee denied a motion by petitioner to recuse himself from presiding over the proceeding, by virtue of the development at the hearing that Sassower's grievance was really against the Referee for his inept handling of his office as Corporation Counsel, not petitioner. Referee Richland found Sassower's criticism of him to be in respect "to a minor aspect of a condemnation proceeding," despite Sassower's testimony that Richland's incompetence was

the real cause of the misunderstanding. As to whether Richland was, in fact, biased, reference should be made to the insulting language he used in depicting not only petitioner, but Sassower, as well.

THE ORDER OF THE COURT

Motions were made by petitioner and respondent to disaffirm and affirm the report to the extent that it was adverse. By order entered the 1st day of June, 1981, the Appellate Division of the Supreme Court for the State of New York for the Second Judicial Department affirmed and disaffirmed in part the Referee's report, to the extent that it found petitioner guilty on all four charges and ordered petitioner disbarred effective immediately. On the 7th day of July, 1981, the New York Court of Appeals denied petitioner's motion for leave to appeal to that Court.

A. PETITIONER'S CONSTITUTIONAL RIGHTS SECURED BY THE FOURTEENTH AMENDMENT WERE VIOLATED BY COMPELLING HIM TO TESTIFY AT HIS DISCIPLINARY HEARING IN VIOLATION OF HIS FIFTH AMENDMENT PRIVILEGE.

The case against petitioner was not only flimsy and weak, but ill-conceived for Mr. Casella to have pressed it. Indeed, petitioner was frivolously charged, in effect, with making a profit on hish risk capital of more than $30,000 that he ventured on behalf of a client in a purely commercial venture, to wit, financing the purchase of a house and advancing capital necessary to make repairs thereon. He was frivolously charged with charging an attorney, at full arm's length, with a small $275.00 fee for the preparation of satisfactions of mortgage, lis pendens, stipulations of

discontinuance, and other papers required by the City of New York to secure payment of a condemnation award. Then there are the two mystery charges, to wit, commingling clients' funds, the identity of the clients still being secret and failure to cooperate in his prosecution, without any witnesses being called upon to support the latter charge. It is thus understandable that when Mr. Casella rested, it was with indecision, and he did so reserving his "rights to produce additional evidence if I feel it's warranted" (250-1).

Counsel for petitioner put the Referee on notice that petitioner would avail himself of his Fifth Amendment privilege against self-incrimination and not testify, stating for the record, "He's not going to testify" (251).

Mr. Casella then sought to intimidate and threaten petitioner by warning him that the Appellate Division would not be favorably disposed to him by making the following outrageous declaration, directed to intimidate petitioner, reciting, "It's been the posture of the Appellate Division, they generally would like to have the benefit of hearing the respondent testify in these proceedings." It must be stressed that the Referee, Mr. Richland encouraged Mr. Casella, by instructing him, "You are free to call any witnesses, *including the respondent.*" It is in this climate that respondent called petitioner as a witness, ignoring petitioner's election not to testify. In this respect, it must be noted that despite the charge of commingling of escrow funds, a possible crime, brushing aside its meritless nature, no warning was given to petitioner concerning his Fifth Amendment privilege. Instead, he was threatened should he exercise it.

The Supreme Court has made it abundantly clear that an attorney cannot be disciplined for availing himself of his privilege against self-incrimination *Spevack v. Klein*, 385 U.S. 511 (1967). It would seem that the privilege is likewise violated where the prosecuting attorney for the Grievance

Committee and the Referee appointed to preside over the disciplinary proceeding join forces to threaten an attorney that the Appellate Division will look unfavorably upon him should he not take the stand and testify.

This Court has often warned the States that it would not tolerate compulsion to require officers to waive their privilege against self incrimination, as a condition to the retention of their jobs. "These are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. New Jersey*, 385 U.S. 493 (1967) Nor may the State require a private contractor to waive his privilege against self-incrimination, as a condition to continue to do business with the State. *Lefkowitz v. Turley*, 414 U.S. 70 (1973). It would therefore seem to follow that an attorney may not be threatened, as in the case at bar, with an unfavorable decision from the ultimate arbitrator of his right to practice law—the Appellate Division—unless he surrender his privilege against self-incrimination. It is in this posture that petitioner was compelled to testify against his expressed objection, clearly in violation of his Fifth Amendment privilege against self-incrimination.

B. WERE PETITIONER'S CONSTITUTIONAL RIGHTS TO ENGAGE IN COMMERCE AND BUSINESS VIOLATED BY HIS DISBARMENT FOR A COMMERCIAL TRANSACTION WITH A CLIENT, WITHOUT ANY EVIDENCE OF OVERREACHING OR FRAUD.

The principal charge against petitioner was the commercial transaction that loyalty led him into with his clients, James and Lottie Gilbert. Petitioner accepted a particularly difficult retainer from these clients. He was hired to institute suit on behalf of James Gilbert to try to prove that someone had removed his name from the deed

to the home he allegedly shared with his deceased uncle and aunt. The probability to succeed in such litigation is generally low. Nevertheless, petitioner accepted the case at a very modest fee, being paid some modest fees in the lower hundreds on several occasions for his work. In this era where lawyers charge upwards of two hundred fifty dollars per hour, it would seem outlandish for any grievance committee to have problems with modest fees.

The County Public Administrator had been designated to administer the estates of the deceased, in view of the fact that the Executor appointed by will was removed by the Surrogate of Queens County. In any event, following service of pleadings and other pre-trial proceedings, the case came on for trial. The case was settled after several days of trial, the agreement being that the property would be sold at public auction and petitioner's clients would receive one fourth of the net proceeds, as calculated by the Public Administrator.

At the public auction, petitioners bid the property for some twenty two thousand dollars, motivated by the fact that this had been their home and they were most desirous of living there. They posted a three thousand dollar deposit. However, the property had fallen into such a state of disrepair that it was not possible to secure mortgage financing and thereby obtain the necessary capital to close title. Therefore, the clients were faced with two financial obstacles to secure the property for their home. Firstly, they had to raise $19,890.00, the balance of the purchase price, or face the loss of their three thousand dollar deposit. Secondly, they had to obtain sufficient advance financing to make the necessary repairs, so that they might obtain a certificate of occupancy and thereby become commercially eligible for mortgage money. They had no way to raise the money and therefore, were faced with a loss of their three thousand dollar deposit and loss of opportunity to regain their home.

It is in this posture that petitioner offered to advance the $19,890.00 necessary to close title. However, he insisted that title be taken in the name of a family corporation to secure his high risk investment. Petitioner, exercising his Constitutional right to engage in the business of home rehabilitation and repairs, invested an additional $11,200.00 to restore the property, to render it eligible for mortgage financing. A mortgage was secured and the proceeds paid over to petitioner, to reimburse him for the $19,890.00 he invested, purchasing the property, the $11,200.00 constituting the cost of repairs and a reasonable profit on the capital he risked. Moreover, the Gilberts testified that petitioner recommended that they retain other counsel, in view of the turn that the transaction had taken, which they told him they did not wish to do, undoubtedly, to save the five hundred dollars that an attorney would charge them for representing them at a closing, that a first year law school student could handle.

It is significant that not a witness was called by the Grievance Committee to testify whether the transaction between petitioner and the Gilberts was fair and reasonable or whether petitioner had taken advantage of them. Indeed, petitioner went beyond his duty as an attorney by risking his own capital to save his clients' venture. For this, petitioner has been disbarred. It would take a twisted mind to find evil in an act by an attorney that went beyond his duty as such, and which ninety-nine percent of the bar would never do, had they represented the Gilberts.

Petitioner was disbarred for unjust enrichment, when no witness testified that the transaction was in any sense of the word, unfair, or that the property was not worth what the Gilberts eventually paid for it. Therefore, it becomes abundantly clear that the Grievance Committee has a policy of disbarring lawyers who engage in commerce, which is in clear violation of the Fourteenth Amend-

ment right of a person to engage in business, whether he be attorney or layman.

"The right to practice one's profession is not without permissible limitation and limiting state statutes have successfully withstood constitutional challenge. . . . However, the limitation must bear a relation to the calling or profession and compliance must be reasonably attainable." *Pharmaceutical Society of State of New York, Inc. v. Lefkowitz*, 454 F. Supp. 1175 (S.D.N.Y., 1978).

It is doubtful that any statute that would bar an attorney for engaging in commerce with a client, irrespective of the fairness of the transaction, would be violative of his Constitutional right to pursue any business vocation. To single out lawyers by precluding them from engaging in commerce is Constitutionally offensive. "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition." *Dent v. State of West Virginia*, 129 U.S. 114 (1889). Given that a statute could not pass Constitutional muster that would restrict an attorney from engaging in commerce, then disbarment for such activity likewise offends the Constitution. Liberty includes "the right of the individual to contract, to engage in any of the common occupations of life. . . ." *Meyer v. Nebraska*, 262 U.S. 390 (1923). Petitioner stands disbarred for having availed himself of such Constitutional right and therefore, his Fourteenth Amendment rights have been violated. The Supreme Court has already held that the First Amendment protects the right of an attorney to advertise. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). It cannot be that he is not similarly protected from engaging in commerce.

C. PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED WHERE THE ONLY WITNESS AGAINST HIM ON ONE OF THE CHARGES WAS THE PROSECUTING ATTORNEY, WHO DECLINED TO TESTIFY, BUT MADE UNSWORN STATEMENTS IN THE GUISE OF INTERROGATION, THEREBY SHELTERING HIMSELF FROM CROSS-EXAMINATION AND MAINTAINING AN UNFAIR CONFLICT OF INTEREST.

Petitioner was charged in charge four with failing to produce his bank statements for his escrow account from December of 1974 to date, pursuant to Rule 691.12(e) of the Rules of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department, pertaining to disciplining procedures for attorneys, which provides as follows:

> "(e) Any attorney who does not maintain and keep or cause to be maintained and kept the accounts and records as specified and required by this section, *or who does not produce any such records pursuant to this Part, shall be subject to disciplinary proceedings.*"

There can be little doubt that Rule 691.12(e) is unconstitutional, as violative of the privilege against self-incrimination secured by the Fifth Amendment. *Spevack v. Klein*, 385 U.S. 511 (1967). However, it is not necessary to reach the issue whether the section quoted is Constitutionally offensive. Perhaps, on another day, the Federal Courts will be called upon to decide the Constitutionality of a provision that, in effect, requires an attorney to waive his privilege against self-incrimination, as the price for retaining his license to practice law. In the case at bar, there simply was no evidence to support the "failure tocooperate"

charge, since the person who made it, Gary L. Casella, the prosecutor, failed to testify and petitioner testified that he did cooperate with the unreasonable demands of Mr. Casella, by turning all of his records over to the latter, who irresponsibly lost them.

Indeed, petitioner testified that he turned all of the records over to Mr. Casella, who promised to furnish him with photocopies and failed to do so. Instead of testifying, Mr. Casella made unsworn, vitriolic name-calling statements, abusing his authority to avoid the witness stand:

> "MR. CASELLA: If I may, Mr. Richland, Mr. Prince is putting me in a position that I'm concealing evidence. *He never gave me records. He doesn't have common sense.*
> THE WITNESS: You said at a quarter after 3, it was the lateness of the hour. You would mail it back to me.
> MR. CASELLA: I have no idea what you're speaking of.
> THE REFEREE: Let's see if we can limit ourselves to asking questions and responding to questions.
> MR. CASELLA: I have no idea what you're speaking of.
> THE REFEREE: Let's see if we can limit ourselves to asking questions and responding to questions.
> MR. CASELLA: This gentleman has persisted in making personal accusations against throughout the entire proceedings before the Appellate Division and he's—I think there is a time it should be stopped. Either he's going to testify as to what happened and beyond that he shouldn't be making all these personal charges." (352)

Mr. Casella had a clear conflict of interest in this proceeding, by acting as prosecutor and complainant against petitioner. It was Mr. Casella who proferred the charge against petitioner that he failed to cooperate with the Grievance Committee in violation of Rule 691.12(e).

Therefore, by virtue of such conflict of interest, he was disqualified from acting as counsel for the Grievance Committee and should have exposed himself to cross-examination. *Ganger v. Payton*, 379 F.2d 709 (4th Circ., 1967). Due process of law is clearly violated where a prosecutor seeks to wear more than one hat in a judicial proceeding. *In re Muchison*, 349 U.S. 133 (1955). Mr. Casella had a duty to disqualify himself in this proceeding, in view of his election to join the charges under investigation with one of his own, to wit, that petitioner had allegedly refused to cooperate with him in the course of the investigation. Mr. Casella was the complainant and therefore, the only witness capable of giving meaningful testimony on the subject, and therefore, should have disqualified himself, testified, and made himself available for cross-examination, a basic right in quasi-criminal proceedings, such as disciplinary actions, that may well lead to penal sanctions. *Pointer v. Texas*, 380 U.S. 400 (1965). This Court has often held that disbarment proceedings are quasi-criminal in nature and the panoply of fundamental Constitutional rights should attend them. *In re Ruffalo*, 390 U.S. 544 (1978).

It is further submitted that a second conflict of interest developed in the course of the hearing. The second charge was made by George Sassower, an attorney, who represented a mortgagee on a building owned by petitioner's corporation. The City of New York condemned the property and it was agreed that the mortgagee would receive $8,000 of the award. However, Sassower had the obligation of preparing the papers required to be executed by his client to secure a release of the check. Sassower testified to the red tape visited upon him and petitioner, each time they delivered the necessary documentation to the office of the Corporation Counsel. He characterized the reason for the repeated refusal of papers as "a very picayune excuse" and that the Corporation Counsel's office "were breaking chops." He testified that "every time

we went down to the City of New York, they found something else wrong." Ultimately, he requested petitioner to do the work for his client, which petitioner did and when he charged Sassower a small fee, $275.00, which he deducted from the $8,000.00 check mailed to Sassower, Sassower filed his complaint with the Grievance Committee that resulted in charge number two. However, Sassower's testimony made it clear that he placed the blame on the inefficiency of the Corporation Counsel, W. Bernard Richland, who acted as Referee in this proceeding.

Although the Referee, Mr. Richland found petitioner not guilty of charge number two, his vitriolic reasoning reflects his prejudice. He wrote: "to the extent that Charge Two goes beyond that, proof of it rests upon conflicting testimony by two persons whose comparative lack of credibility is approximately equal and therefore cannot be regarded as established." Certainly, Richland's only reason for criticizing Sassower is the latter's frank testimony that Richland, himself, was the cause for the second charge, and therefore, Richland's report reflects his prejudice. He should have granted petitioner's motion to recuse himself, by reason of his obvious conflict of interest.

D. PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW BY CONVICTING HIM OF UNJUST ENRICHMENT ON THE FIRST CHARGE ACCUSING HIM OF MAKING A USURIOUS LOAN.

The charges were extremely inartistically drawn by Mr. Casella, rambling on to the point, that it is difficult to decipher their meaning. However, after culling through the trail of muddy verbiage, it surfaces that petitioner was charged with "a usurious interest charge of $1,800 on the $22,100 invested for six months by JPJ Contractors, Inc. and Jayne Prince." However, at trial, the Gilberts gave no

testimony to suggest that they had made a loan from petitioner, but rather that he had invested some thirty thousand dollars in an effort to cure their default on closing and to render the dwelling habitable, so that mortgage money would be forthcoming. Therefore, although petitioner was charged with making a usurious loan, he was tried and convicted for alleged unjust enrichment. Due process of law was violated by the failure to furnish petitioner with accurate notice of the charges and, indeed, by misleading him. *In re Ruffalo*, 390 U.S. 544 (1968).

E. PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY FINDING HIM GUILTY OF COMMINGLING CLIENT'S FUNDS, WITHOUT NOTICE OR EVIDENCE OF THE IDENTITY OF THE CLIENTS WHOSE FUNDS WERE COMMINGLED.

The third charge accused petitioner of commingling clients funds. He was found guilty thereof. It is still a mystery which client's funds were commingled. Not a single client ever complained of commingling and none were identified at the hearing. As for the fee dispute with Sassower, he was not a client. Indeed, the Referee in his report, in finding petitioner not guilty on the second charge involving Sassower's complaint, indicated that Sassower's complaint overlapped into the third charge. The third charge, however, accuses that petitioner "commingled clients' and personal funds." As stated, Sassower was not a client and, therefore, the charge concerning him was not relevant to the third charge. It would be nice if some day, the learned Mr. Casella, the learned Mr. Richland and the learned Appellate Division would disclose to petitioner the identity of the clients whose funds he has been found guilty of commingling. Indeed, by finding petitioner guilty on

this third charge, Casella, Richland and the Appellate Division turned the proceeding into a sham and a farce and might well have told him they did not want him to remain a member of the bar because he is a non-politically connected lawyer. There simply was not an iota of notice or evidence of the identity of any client whose funds were supposed to be commingled. Certainly, where a Grievance Committee engages in such fraud, it serves no useful purpose and can only work to intimidate members of the bar and discourage them from vigorously representing their clients.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Part 691 of the Rules of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department creates the machinery for a permanent agency for the discipline of attorneys. It is a bureaucratic product of the Appellate Division that hires a full time professional staff entrusted with the investigation and prosecution of complaints against attorneys accused of professional misconduct. Inherent in its operations, is a built in quota system, which requires prosecutions for the survival of the job opportunities offered by the agency. If this be not sinister enough, it has its own blueprint for "country club" membership in the bar, weeding out those considered to be "undesirable," not necessarily by reason of true misconduct, but by virtue of imbedded prejudice and a touch of corruption. Thus, the usual targets of the Grievance Committee are lawyers, unaffiliated with large firms and without political clout. Moreover, lawyers engaged in commerce and business are the particular targets of the Grievance Committee, since it discourages exercise of these Constitutional activities. By aiming its sights on those lawyers considered to be expendable, the agency satisfactorily perpetuates itself, secure

that its decision will be rubber stamped by its creator, the Appellate Division. It is this very philosophy, however, that works to create a Constitutional vacuum in its operations, and demotes attorney-targets to the class of second class citizens.

The case of your petitioner is strongly in point. Your petitioner is sixty-eight years of age and had been a member of the bar for forty-two years, prior to the order of disbarment. Your petitioner is Jewish, politically inactive and engaged in commerce, that is looked down upon by other members of the bar, despite its importance in preserving ghetto areas of the community. Your petitioner, through corporate intermediaries, is engaged in the business of purchasing run-down ghetto single and two family houses in low income neighborhoods, rehabilitating and repairing the property to make it habitable and then selling the property to low income buyers, who are usually blacks and Hispanics. Petitioner's work is important to maintain neighborhoods that would otherwise further deteriorate and therefore, he performs a valuable service to the community. The investment in this business is high risk, since the property is located in low income neighborhoods, with constant danger of vandalism, and is particularly hit hard when interest rates increase. Indeed, the repairs to the Gilbert home had to be done twice, due to intervening vandalism. Nevertheless, people like the Gilberts, despite their marginal income, are thereby afforded opportunity to live in decent housing and neighborhoods can be maintained, due to the efforts of petitioner in risking capital.

Any lawyer engaged in such business is looked down upon. He is not in the position of Park Avenue and Wall Street law firms to charge the ever increasing hourly rates to wealthy corporate clients, and who seem never to be criticized professionally for their excesses, but he falls from grace when a complaint arrives that he charged a few

hundred dollars or thereabouts, and is stamped a "rogue" without any evidence, as in the case at bar, that the complainant was, in fact, actually cheated.

The Constitutional issues raised herein are not only important from the point of view of the far reaching substantive issues contained therein and to vindicate the Constitutional rights of lawyers, but also, for this Court to put limitations upon the awesome power of the Grievance Committees that, unless checked, will continue to use their authority to weed out lawyers they believe are unworthy of "country club" membership. Their abuse of authority can only work to intimidate the bar, and thereby reduce its usefulness to the public. Certainly, no lawyer again would ever use his own capital to preserve a client from ruin, as in the case at bar, given the outrageous professional consequences. This is bad. Intimidation of the bar not only violates the Constitutional perogative of the lawyer, but likewise works to disserve the public. A timid lawyer, fearful of a super-agency, with ominous power, rubber stamped by the Disciplinary Court, is an ineffective lawyer, who will not vigorously champion the rights of his client, being too busy to watch his own back.

CONCLUSION

FOR THE FOREGOING REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

Respectfully submitted,

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212-658-5500

APPENDIX

APPENDIX A—DECISION OF COURT OF APPEALS

1 Mo. No. 752
In the Matter of C. John Prince, an attorney admitted to practice under the name of Clarence J. Prince.
Grievance Committee for the Second and Eleventh Judicial Districts,

Respondent,

C. John Prince,

Appellant.

Motion for leave to appeal and for a stay denied.

DECISION COURT OF APPEALS JUL 7 1981

APPENDIX B—ORDER OF DISBARMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 1, 1981.

HON. MILTON MOLLEN, Presiding Justice,
HON. JAMES D. HOPKINS,
HON. VINCENT D. DAMIANI,
HON. VITO J. TITONE,
HON. LEON D. LAZER. *Associate Justices*

In the Matter of C. John Prince, an attorney, admitted to practice under the name Clarence J. Prince.

Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner;

C. John Prince,

Respondent.

A disciplinary proceeding having been instituted in this court upon the petition of the Grievance Committee for the Second and Eleventh Judicial Districts in respect to C. John Prince, an attorney and counselor at law, who was admitted to practice by this court on April 27, 1938 under the name Clarence J. Prince; the petition praying that the respondent be disciplined for professional misconduct upon the charges therein set forth; and the respondent having filed an answer (affidavit) to the petition; and this court, by an order dated November 20, 1979, *inter alia*, having referred the issues raised by the petition and the answer (affidavit) to W. Bernard Richland, Esq., as Special Referee, to hear and to report, with his findings upon each of the issues; and the said Special Referee having held a hearing and having filed his report with this court on

September 22, 1980, together with the minutes of the hearing and the exhibits; and the petitioner having moved, by a notice of motion, dated September 23, 1980, to confirm in part and disaffirm in part the said Special Referee's report, and the respondent having cross moved by a notice of cross-motion, dated October 13, 1980, to disaffirm the said report as to charges one, three and four and to confirm the report as to charge two;

Now, upon the said petition, verified March 2, 1979; the said answer (affidavit) sworn to April 3, 1979; the report, the transcript; the exhibits, the said notice of motion; the affidavit of Gary L. Casella and petitioner's brief in support of the petitioner's motion; the said notice of cross-motion; the affirmation of Robert E. Green and the papers annexed thereto in support of respondent's cross-motion; the affidavit of Gary L. Casella in opposition thereto and in further support of the petitioner's motion; the affirmation of Robert E. Green in reply thereto; and upon all the papers filed herein; and Gary L. Casella, Esq., having appeared of counsel for the petitioner and Robert E. Green, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon; and upon the *PER CURIAM* opinion herein, dated June 1, 1981, heretofore filed and made a part hereof, it is unanimously

ORDERED that the petitioner's motion to confirm in part and to disaffirm in part the said Special Referee's report is hereby granted in accordance with the said opinion *PER CURIAM*, and it is further

ORDERED that the respondent's cross-motion is hereby denied, and it is further

ORDERED that, effective June 1, 1981, the said respondent C. John Prince, admitted under the name Clarence J. Prince, be and he hereby is disbarred from the practice of the law, and the name of C. John Prince, admitted under the name Clarence J. Prince, is hereby directed to be struck from the Roll of Attorneys and Counselors at Law, and it is further

ORDERED and DIRECTED that the respondent C. John Prince, admitted under the name Clarence J. Prince, shall promptly comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys—a copy of such rules being annexed hereto and made a part hereof, and it is further

ORDERED that, pursuant to statute (Judiciary Law, §90), effective June 1, 1981, the said C. John Prince, admitted under the name Clarence J. Prince, be and he hereby is commanded to desist and refrain: (1) from practicing law in any form, either as principal or as agent, clerk or employee of another; (2) from appearing as attorney or counselor at law before any judge, justice, board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto; and (4) from holding himself out in any way as an attorney or counselor at law.

Enter:
IRVING N. SELKIN
Clerk of the Appellate Division.

APPELLATE DIVISION—SUPREME COURT SECOND JUDICIAL DEPARTMENT—STATE OF NEW YORK

I, IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this with the original filed in my office on JUN 1—1981 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand affixed of this Court on JUN 1—1981

s/ Irving N. Selkin

APPENDIX C—DECISION OF APPELLATE DIVISION SECOND DEPARTMENT

SUPREME COURT: APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

MOLLEN. P.J., HOPKINS, DAMIANI, TITONE and LAZER, JJ., concur.

In the Matter of C. JOHN PRINCE, an attorney admitted to practice under the name CLARENCE J. PRINCE.

GRIEVANCE COMMITTE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner;

C. JOHN PRINCE,

Respondent.

Nos. 6530 & 6691

DISCIPLINARY proceeding instituted by the Grievance Committee for the Second and Eleventh Judicial Districts. By order of this court dated November 20, 1979, the issues were referred to W. Bernard Richland, Esq., as Special Referee, to hear and report.

Frank A. Finnerty, Jr., Brooklyn, N.Y. (Gary L. Casella of counsel) for petitioner.

Robert E. Green, Forest Hills, N.Y., for respondent.

PER CURIAM. The respondent was admitted to practice by this court on April 27, 1938, under the name of Clarence J. Prince.

The respondent was charged with the following allegations of misconduct:

Charge One: The respondent was guilty of conduct involving dishonesty, fraud, deceit and a gross conflict of interest in that, after he was retained to stop the sale of a house by the Public Administrator and to reform the deed for said property, he, among other things, entered a successful bid for the property on behalf of his clients, and had his clients execute an assignment of the contract of sale from the Public Administrator to a corporation in which the respondent was an officer and his wife was the sole stockholder, without explaining to his clients the nature of the documents they were signing; that the respondent later re-conveyed the property back to his clients, after obtaining an FHA mortgage for them; and that the aggregate price paid by the clients for the premises was approximately $22,000 more than the corporation had paid.

Charge Two: The respondent was guilty of conduct involving dishonesty, fraud, deceit and misrepresentation by converting escrow funds entrusted to him, in that, among other things, he converted escrow funds in the amount of $8,000 by drawing checks payable against said funds to be applied in payment of his own personal obligations and for his own benefit.

Charge Three: The respondent was guilty of failing to maintain a duly constituted escrow account and of commingling clients' funds.

Charge Four: The respondent failed to co-operate with the petitioner Grievance Committee in its investigation of complaints regarding the afore-mentioned misconduct.

The referee found respondent guilty of all of the allegations of misconduct, with the exception of charge two which alleged conversion.

The petitioner has moved to confirm in part and disaffirm in part the referee's report and respondent has cross-moved to disaffirm said report as to charges one, three and four and to confirm the report as to charge two. After reviewing all of the evidence we are convinced that all of

the charges of misconduct were proven, and we therefore find the respondent guilty of each of the afore-mentioned charges. Accordingly, the petitioner's motion to confirm in part and disaffirm in part the referee's report is granted and the respondent's cross motion is denied.

The respondent is adjudged guilty of serious professional misconduct and should be, and hereby is, disbarred from the further practice of law, and his name is ordered stricken from the roll of attorneys and counselors at law effective forthwith.

MOLLEN, P.J., HOPKINS, DAMIANI, TITONE and LAZER, JJ., concur.

APPENDIX D—REPORT OF REFEREE

SUPREME COURT, APPELLATE DIVISION
SECOND DEPARTMENT

In the Matter of C. JOHN PRINCE, an attorney and counselor at law, admitted under the name of CLARENCE J. PRINCE, Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner,

C. JOHN PRINCE,

Respondent.

REPORT OF REFEREE

FRANK R. FINNERTY
Counsel for Grievance Committee for
Second and Eleventh Judicial Districts
(GARY L. CASELLA, of Counsel),
Attorney for Petitioner
ROBERT E. GREEN, Attorney for
Respondent

REPORT

W. BERNARD RICHLAND, Referee. This disciplinary proceeding, brought against respondent who was admitted to practice on April 27, 1938, arises in principal part out of a set of strange circumstances in which James Gilbert, an unskilled, Black workingman with a fifth grade education, ended up paying to respondent and a series of respondent-owned corporations, a total sum of $44,500—$12,650.04 in cash plus the proceeds of a $31,850 FHA guaranteed mortgage—for title to a one-family house in St. Albans,

Queens, in which Gilbert claimed a half-interest and which was part of an estate in possession of the Queens County Public Administrator. That half-interest claim was settled for $1,913.95 purportedly representing one fourth of the net proceeds of the sale of the house to respondent, after litigation in which Gilbert was represented by respondent, from which sum respondent deducted $400 as an additional "fee".

A separate charge against respondent arose out of a quarrel with another attorney involving a claim in condemnation in which it is asserted that respondent made improper use of escrowed funds.

The tortuous details of the transactions were laid out in six days of testimony during which some fifty-five exhibits were placed in evidence.

1.

In August 1975, James Gilbert retained respondent to enforce his rights in regard to a house in St. Albans, Queens, which was part of the estate of his uncle's widow and which was in the control of the Queens County Public Administrator (18, 66-68).* Mr. Gilbert was part-owner of the house, he having contributed equally with his uncle and aunt towards the purchase price in 1960 (15, 16), and lived in the house and shared in the cost of its upkeep from 1960 to 1971 (16, 71-2). When his uncle's widow died in 1974, Mr. Gilbert discovered that his "name was no longer listed on the deed" (17), his name having been forged on a deed transferring the property to his uncle and his uncle's wife (47). For his services in the matter, respondent was paid $325 (19, 67), plus $350 (20, 67) plus $500 (20, 67), plus $400 (53-54)—a total of $1,575 (263-4). The full recovery obtained by respondent for his client was the gross sum of $1,913.95

*References are to pages of the stenographer's minutes of the hearing before the Referee.

(53) and the net of $1,313.95 (5, 9, Pet. Exh. 5) was paid to Mr. Gilbert in 1979 (56) only after he and his wife retained another lawyer to obtain payment of the sum due (50,260; Pet. Exh. 5).

2.

By letter dated July 12, 1976, respondent, acting on behalf of Mr. and Mrs. Gilbert made an offer to the Queens County Public Administrator to purchase the house, in which Mr. Gilbert claimed an interest, for $14,500 (68-72, Pet. Exh. 7). The Gilberts gave respondent $3,000 (70-71) "for bid and incidental expenses" (Pet. Exh. 7); thereafter two additional sums of $3,000 (77)—one by a check endorsed by Mrs. Gilbert for $2,884.35 (Pet. Exh. 9) plus an additional $115.65 (Pet. Exh. 10) and "another three thousand" (78, 79)—and later an additional $3,000 (80, Pet. Exh. 11).

Thereafter, the Gilberts borrowed $3,586.54 from Citibank (Pet. Exh. 13) and "gave the money directly" to respondent (86). Although respondent's bank records reflect a deposit in his account in the exact amount of $3,586.54, almost contemperaneous with the Gilberts' loan transaction (Pet. Exh. 33) respondent flatly denied that he received any such monies from the Gilberts (312, 314-315). Respondent's testimony in this regard is unbelievable and reflects upon his credibility. Nor does the circumstance that the testimony was drawn from respondent by petitioner require that petitioner be bound by respondent's patently false statement *Becker v. Koch*, 104 N.Y. 374, 401.

Without consulting the Gilberts, respondent submitted to the Public Administrator a bid on their behalf of $22,100 (73-74) and by instrument dated August 23, 1976, they contracted to purchase the house for $22,100 (Pet. Exh. 8). Thereafter "at the closing" (355), the Gilberts, signed in blank an uncompleted and undated

"assignment" of the contract under which the name "P.J. Contracting, Inc., C. John Prince." appears (Pet. Exh. 8, back page). Understandably, the Gilberts seem to have been unaware of what they were signing, or that they were transferring their rights, or who P.J. Contracting, Inc. was (75-7). Actually, P.J. Contracting was a respondent-controlled entity (273). Respondent identified himself on the contract as "the broker" to whom the Public Administrator would pay a commission (Pet. Exh. 8, para. 24). The amount of that commission was deducted from the selling price of the property; one quarter of which, less all charges, was to be paid to Mr. Gilbert (5,950,260, Pet. Exh. 5). Although it is obvious that respondent was at all times the Gilberts' attorney, he claimed that such was not the case and that in the transaction he was merely the real estate broker under the name of "Big Ed" for a commission of $1,326 (Pet. Exh. 27, 270-279, 359, 371), thus justifying his, in effect, obvious conflict of interest to his client's disadvantage (358, 373-4). In addition, the commission became an added item in figuring the eventual cost of the house to the Gilberts and the $31,850 F.H.A.-guaranteed mortgage through which respondent, acting by various dummy corporations, was enriched at his clients', the Gilberts, expense (377-378, Pet. Exh. 27).

It was obviously intended that the Gilbert's would be the eventual purchasers of the house (350), P.J.P. Corporation being used as an intermediary in the deal (350-351, 356). In order to obtain an F.H.A.-guaranteed mortgage, respondent testified (350, 361-366), it was necessary that the house be put in good repair. For that purpose the respondent-controlled P.J.P. corporation, engaged Pajohn Management Corporation—another instrumentality controlled by respondent (356, 364). At the same time respondent through the P.J.P. corporation purportedly entered into a contract with the Gilberts to sell the house to them (357), but respondent, when asked "do you have the con-

tract?" answered "No" and, "I don't have the contract" (357). At the signing of the contract between J.P.J. and the Gilberts respondent "represented J.P.J." and not the Gilberts (358). At the actual closing, respondent again represented his family corporation, J.P.J. Contractors (386), and, apparently, was so regarded as the attorney for the Gilberts that the deed was noted to be returned to respondent—"G. John Prince, Esq." (Pet. Exh. 15, acknowledgment page), yet respondent insisted that he only represented the J.P.J. corporation and arranged to have the recorded deed returned to him as a service to the Gilberts (386). Thus, by a series of payments, fees, commissions, interest, etc. to respondent and the use of a series of respondent-controlled and family-owned corporations, the house in St. Albans in which Mr. Gilbert had a half-interest, which the Gilberts originally offered to buy from the Public Administration for $14,500 and which respondent purportedly purchased for $22,100, was finally obtained by Gilberts at a total cost of $44,500 (401).

CONCLUSION AS TO CHARGE ONE

It is concluded that respondent took advantage of two uneducated working people, that he enriched himself and family-owned corporate entities which he controlled, to the detriment of his clients, that he overreached his clients, defrauded them and engaged in a gross conflict of interest in his dealings with them.

3.

Respondent failed to produce his records when requested, failed to comply with a direction by petitioner to produce such records, and provided certain of his records necessary for the proper conduct of the proceedings only after an order of this Court requiring that he do so under

pain of his being adjudged in contempt of this Court for failure to do so.

4.

By letter dated March 17, 1978, petitioner requested that respondent produce "copies of each and every monthly statement for your escrow account from December, 1974 to date" (Pet. Exh. 32). On May 8, 1978, respondent submitted such monthly statements from March, 1974 to March, 1978—omitting the monthly statements for the entire year 1975 (Pet. Exh. 33), and noting in the accompanying letter, "This is only part of what you requested, there will be more coming." But it was not until October 25, 1979 that respondent actually produced the 1975 escrow monthly bank statements (Pet. Exh. 36). By subpoena served March 8, 1979 (Pet. Exh. 31) respondent was directed to produce his cancelled checks and check stubs for 1975 and copies of the closing statements on the transactions which were the subject of Charge One, above. Respondent failed to respond to the subpoena, necessitating an application for and the issuance of an order of this Court dated June 22, 1979, compelling appropriate response to the subpoena under pain of punishment for contempt (Pet. Exh. 34). Respondent thereafter produced both the missing 1975 escrow account monthly statements (Pet. Exh. 36) and a purported closing statements on the final sale of the house to the Gilberts (Pet. Exh. 25) and explained his failure to produce the subpoenaed cancelled checks and stubs on the ground that his office had been burglarized (599-600). While it may strain credibility to accept the notion that a burglar would be interested in stealing check stubs and cancelled checks, absent evidence to the contrary, that testimony cannot be rejected.

CONCLUSION AS TO CHARGE FOUR

Respondent failed to cooperate in the investigation of complaints made against him, failed to properly respond to a subpoena duly served in connection with such investigation, necessitating an application to this Court for and the issuance of an order by this Court compelling compliance with such subpoena.

5.

Charge Two and Charge Three are of considerably less significance than Charge One. Nor do they have the impact on the principle Charge which Charge Four had.

Charge Three asserts that respondent "commingled clients and personal funds and caused checks to be issued for both escrow and personal obligations." The testimony shows a pattern of carelessness in regard to the use of his escrow account, plainly inconsistent with the normal and required standards for the maintenance of escrow records. See Rules of this Court, Section 691.12, subd. a; *Code of Professional Responsibility*, D.R. 9-102(a).

6.

Funds in the so-called escrow account were moved back and forth between the numerous corporations controlled and operated by respondent, without apparent regard for anything other than respondent's convenience, and checks drawn on the account for personal and family purposes in a bewildering series of transactions (530-586, passim), including one transaction in which respondent, purportedly to avoid an Internal Revenue restraint order, took funds out of an escrow account and put the cash in his own safe deposit box (535-539), even though he testified that escrow funds would be exempt from seizure by the IRS (549).

The remaining Charge Two is essentially a dispute between two lawyers, respondent and one George Sassower (as to whom, see Memorandum Opinion of Appellate Division, First Department, in *Matter of Galamison*, N.Y.L.J. 9-18-80) who share a common quality—low standards of professional character—the testimony of neither of whom seems worthy of belief.

CONCLUSION AS TO CHARGE TWO

To the extent that the Charge relates to the misuse of escrow funds it is comprehended within Charge Three and to that extent the Charge was established; to the extent that Charge Two goes beyond that, proof of it rests upon conflicting testimony by two persons whose comparative lack of credibility is approximately equal and therefore cannot be regarded as established.

The Application to Recuse

Respondent in a Brief and Proposed Findings and Conclusions, submitted several weeks after the completion of the hearing before the Referee, made an "application to disqualify [the] Referee" on the purported ground that the witness Sassower made an adverse comment in regard to the procedures of the Office of the Corporation Counsel in regard to a minor aspect of a condemnation proceeding. The application is devoid of merit and it is rejected for the reasons set forth in the affidavit of Gary L. Casella, Esq., dated July 3, 1980.

s/ W. Bernard Richland

9-19-80

APPENDIX E—PETITION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

In the Matter of C. John Prince, an attorney and counselor at law, admitted under the name of Clarence J. Prince

GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner,

C. JOHN PRINCE,

Respondent.

TO: THE HONORABLE, THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT:

The petition of the Grievance Committee for the Second and Eleventh Judicial Districts respectfully alleges that:

FIRST: By order of this Court, dated and filed December 4, 1978 the Grievance Committee for the Second and Eleventh Judicial Districts was authorized to institute and prosecute a disciplinary proceeding in this Court against C.J. Prince based on the acts of professional misconduct as set forth in the confidential report of the Grievance Committee for the Second and Eleventh Judicial Districts filed in this Court and on any other charges of professional misconduct by said attorney which may come to said Committee's attention. Further, said order of December 4, 1978 appointed Frank A. Finnerty, Jr., Esq. as attorney for the petitioner in this proceeding.

SECOND: Said order of December 4, 1978 was duly made and filed by this Court pursuant to the authorization of Section 90 of the Judiciary Law and pursuant to Section 691.4 of the Rules Governing the Conduct of Attorneys of this Court.

THIRD: The respondent, C. John Prince, was admitted to practice as an attorney and counselor at law in the Courts of the State of New York by the Appellate Division of the State Supreme Court, Second Judicial Department, on April 27, 1938.

FOURTH: Upon information and belief at all times hereinafter mentioned, respondent engaged in the practice of law and maintained an office for said purpose in Queens County.

FIFTH: Upon information and belief respondent, C. John Prince, has been guilty of illegal, corrupt and unethical practices and of professional misconduct and conduct prejudicial to the administration of justice as an attorney and counselor at law in that:

CHARGE ONE

A. RESPONDENT, C. JOHN PRINCE, HAS BEEN GUILTY OF CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT AND A GROSS CONFLICT OF INTEREST AS FOLLOWS:

1. In or about 1975, James Gilbert and his wife, Lottie Gilbert, retained respondent to represent them in bringing an action to stop the sale by the Public Administrator and to reform the deed for premises located at 114-62 199th Street, St. Albans, New York. James Gilbert alleged that he along with his aunt and uncle, Reba and Roger Gilbert, had purchased said house in 1960.

After the death of his aunt in 1974, (the uncle had predeceased her), James Gilbert ascertained that without his knowledge, his name had been removed from the deed for said premises.

Respondent on behalf of his clients, James and Lottie Gilbert, commenced the action in Supreme Court, Queens County. The Gilberts paid respondent legal fees in the approximate amount of $1,175. During the trial of the matter, a stipulation of settlement was entered into whereby James Gilbert was to receive twenty five (25%) per cent of the proceeds of the sale of said property. After the stipulation was approved by the Court, the Public Administrator authorized the public auction of the property. James and Lottie Gilbert decided to bid for the house, to purchase it for themselves to live in. The Gilberts on or about July 15, 1976 gave respondent $3,000. to be used for the bid and down payment for the premises to be auctioned by the Public Administrator.

Respondent without advising his clients to be in attendance entered a bid on their behalf for the premises in the amount of $22,100., (which was in excess of what the Gilberts expected to pay for the house) which was accepted by the Public Administrator.

On August 23, 1976, a contract was entered into between the Public Administrator and the Gilberts to sell them the house located at 114-62—199th Strete, St. Albans, New York for $22,100. Thereafter:

(a) Respondent who advised his clients that they would not be able to obtain an FHA mortgage to purchase the premises because said house was in a state of extreme disrepair offered to loan them monies on which he would take back a mortgage.

(b) On October 29, 1976, respondent without explaining to the Gilberts what they were signing, (and the Gilberts believing that they would be purchasing the house with C. John Prince taking back a mortgage for the monies he would loan them) caused his clients to execute an assignment of contract from the Public Administrator to JPJ Contractors, Inc., a corporation in which respondent was an officer, namely, secretary and his wife, Jayne Prince was the sole stockholder.

(c) JPJ Contractors, Inc. purchased said premises for $22,100. from the Public Administrator of Queens County as Administrator C.T.A. of the Estate of Reba Gilbert.

(d) By deed dated June 16, 1977, which was not caused to be recorded by respondent until October 4, 1977, title to said premises was conveyed by JPJ Contractors, Inc. back to James and Lottie Gilbert.

(e) Respondent without the consent of James and Lotti Gilbert represented both JPJ Contractors Inc. and the Gilberts as attorney at the closing.

(f) Respondent obtained an FHA mortgage for the Gilberts in the amount of $31,850. In addition, Mr. & Mrs. Gilbert gave respondent $12,650. or an aggregate of $44,500. for the premises the Gilberts had originally contracted to purchase from the Public Administrator for $22,100.

(g) Respondent failed to furnish a closing statement to the Gilberts.

(h) Included in the monies paid by the Gilberts were *inter alia*, the following charges:

1) A real estate brokerage fee charged by Big Ed Realty Corp. to the Gilberts in the amount of $1,326. Respondent is an officer in Big Ed, namely, secretary and his wife, Jayne Prince, is the sole stockholder.

2) A legal fee charged by respondent to the Gilberts in the amount of $300.

3) A usurious interest charge of $1,800. on the $22,100. invested for six months by JPJ Contractors Inc. and Jayne Prince.

4) Alleged repairs made to the premises at the request of JPJ Contractors, Inc. at a cost of $7,200.

CHARGE TWO

B. RESPONDENT, C. JOHN PRINCE, HAS BEEN GUILTY OF CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT AND MISREPRESENTATION BY CONVERTING ESCROW FUNDS ENTRUSTED TO HIM AS FOLLOWS:

1. Respondent was an officer, namely the secretary, and his wife Jayne Prince, the sole stockholder of a corporation by the name of Certisch Construction Corp. A mortgage against realty owned by the latter corporation was held by Madison Heat Corp. The City of New York took said property pursuant to its powers of condemnation, paying an award to Certisch in the approximate amount of $12,000. A settlement was arrived at that $8,000. would be paid to Madison Heat by Certisch in satisfaction of the mortgage which was in excess of that amount.

The attorney for Madison Heat, George Sassower, Esq. sent a satisfaction of mortgage to the respondent under covering letter dated December 23, 1974 to be held by the latter until the settlement was paid to Madison Heat. In addition, Sassower and respondent agreed that respondent would hold the award from the City of New York in escrow until Madison Heat was paid the $8,000.

Subsequently, respondent sent a check drawn on his escrow account dated February 19, 1975, made payable to the order of George Sassower, Esq. and Madison Heat Corp., in the amount of $7,725., which comprised the balance of the $8,000. settlement, after respondent had deducted legal fees.

Sassower upon receipt of the check returned it to respondent and demanded that he immediately issue another check in the amount of $8,000. since Sassower averred that respondent had no right to deduct legal fees from the payment to be made from escrow.

When respondent failed to forward another check, Sassower on behalf of his client, Madison, brought an action against respondent in Supreme Court of the State of New York, County of Queens seeking to recover the $8,000. plus interest and costs. Pursuant to an appeal taken by Madison Heat, the Appellate Division, Second Judicial Department in *Certisch Construction Corp., et al v. Madison Heat Corp.*, 56 A.D. 2d 642 (1977, 2nd Dept.) modified an order entered by Special Term to the extent that it granted partial summary judgment to Madison against Prince in the amount of $7,250. Further, the Appellate Division noted in its decision that C. John Prince was the "escrowee in the settlement of the claim." The amount of legal fees due Prince, if any, were left to be resolved at trial.

A judgment was entered by Madison Heat. However,

(a) The judgment could not be enforced against respondent, notwithstanding that supplementary proceedings were conducted, since respondent without the knowledge or consent of Madison Heat Corp. and/or its counsel, George Sassower, Esq., converted from escrow the $8,000. which had been entrusted to him, by drawing or causing checks payable against said fund to be applied in payment of his own personal obligations and for his own benefit.

(b) Not until March, 1978 did respondent issue a check to Madison Heat in the amount of $7,725. The check which was drawn by respondent on his account entitled "C. John Prince, Escrow Account" with the Marine Midland Bank, Jamaica, New York was accepted by Madison Heat Corp. in full settlement of its claim.

CHARGE THREE

C. RESPONDENT HAS BEEN GUILTY OF FAILING TO MAINTAIN A DULY CONSTITUTED ESCROW ACCOUNT AND OF COMMINGLING CLIENTS' FUNDS AS FOLLOWS:

1. In the period between 1975 to date, respondent maintained a bank account No. 009-753095 with Marine Midland Bank, entitled "C. John Prince Escrow Acc." in which account respondent commingled clients and personal funds and caused checks to be issued for both escrow and personal obligations.

CHARGE FOUR

D. RESPONDENT HAS FAILED TO COOPERATE WITH THE GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS IN THE LEGITIMATE INVESTIGATION OF COMPLAINTS OF PROFESSIONAL MISCONDUCT MADE AGAINST HIM AS FOLLOWS:

1. Although repeatedly requested by the petitioner to produce all bank statements for his account No. 009-753095 entitled C. John Prince, Escrow Account from December, 1974, respondent after long delay, produced only some statements for the period 1976 and 1977 and none from December, 1974 through December 31, 1975, which respondent had been advised by petitioner were most important.

2. Respondent refused to furnish to petitioner copies of the closing statements for the purchase of the aforesaid premises by JPJ Contractors Inc. from the Public Administrator and the subsequent sale by JPJ Contractors Inc. to James and Lottie Gilbert.

SIXTH: Respondent, C. John Prince, knew or should have known in committing the acts aforesaid, that he was violating the applicable statutes of the State of New York; the Code of Professional Responsibility of the New York State Bar Association, effective January 1, 1970, as amended, including DR 1-102 (A)(4), (5) and (6), DR 5-101(A), DR 5-104(A) and DR 9-102(A)(B)(3)(4) and the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department; (22 NYCRR §691.12(a)(b) and (c)).

SEVENTH: The sources of petitioner's knowledge are embodied in the annexed petition, as justice may require, and for such other and further relief in the premises as may be just and proper. Respondent shall serve and file two copies of his answer with proof of service on or before the return date.

Dated: Brooklyn, New York
March 2nd, 1979

Yours, etc.

FRANK A. FINNERTY, JR.
Attorney for Petitioner

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TO:
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Opposition

81-456

Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1981

C. JOHN PRINCE,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

C. JOHN PRINCE,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department.

Preliminary Statement.

Respondent's brief is submitted in opposition to the petition for a writ of certiorari, pursuant to the denial by order dated July 7, 1981, of the New York Court of Appeals to grant leave to appeal, *Matter of Prince*, _____ N. Y. 2d _____ (1981), from the order of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department, which by order entered on June 1, 1981, disbarred petitioner. *Matter of Prince*, 81 A. D. 2d 61 (2nd Dept. 1981).

Jurisdiction.

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C. §1257(3).

Statement of the Case.

In disbarring petitioner, the Appellate Division, Second Department, in its aforesaid order of June 1, 1981, sustained in full the charges of professional misconduct brought against petitioner.

It is illustrative of petitioner's egregious acts which resulted in his disbarment to quote from the referee's report regarding the findings as to Charge One,

> "It is concluded that respondent* took advantage of two uneducated working people, that he enriched himself and family-owned corporate entities which he controlled, to the detriment of his clients, that he overreached his clients, defrauded them and engaged in a gross conflict of interest in his dealings with them."

The Appellate Division also found that petitioner had converted $8,000 of escrow funds entrusted to him, commingled funds and failed to cooperate with the Grievance Committee.

Petitioner's "Statement of the Case," which is set forth in his petition for a writ of certiorari, is replete with misrepresentations as to the evidence adduced at the hearings conducted by the referee assigned by the Appellate Division, Second Judicial Department, in the disciplinary proceeding.

---

*The petitioner, C. John Prince, was referred to as the "respondent" during the course of the disciplinary proceeding.

Essentially the evidence established the following as to the respective charges in the petition, which as noted were fully sustained by the Appellate Division:

CHARGE ONE.
(Gilbert Matter.)

In or about September, 1975, James Gilbert and his wife, Lottie Gilbert, retained petitioner as their attorney, to stop the sale by the Public Administrator of premises known as 114-62 199th Street, St. Albans, New York. Petitioner also was to attempt to cause the deed to the subject house to be reformed.

James Gilbert had purchased the house, along with his uncle and aunt, Roger and Reba Gilbert, in 1960. He lived in the house with them from the latter date until 1971, when he moved out.

After the death of his uncle in or about 1973 and his aunt in 1974, James Gilbert learned that his name had been removed from the deed, without his knowledge or consent. He then retained petitioner, paying him legal fees which at the conclusion aggregated $1,575, to perform the aforesaid services.

During the trial of the action to reform the deed, a stipulation of settlement was entered into in which it was agreed with the Public Administrator that the Gilberts would receive twenty-five percent (25%) of the proceeds of the sale of the subject property.

Thereafter, the Public Administrator authorized a public auction of the property. Mr. and Mrs. Gilbert decided to bid for the house, which Mr. Gilbert had earlier lived in for eleven years.

Mr. and Mrs. Gilbert, on July 15, 1976, gave petitioner $3,000 to be used to enter a bid and make the down payment, among other things.

A bid was accepted on behalf of the Gilberts for $22,100. On August 23, 1976, a contract was entered into between the Public Administrator and the Gilberts to sell them the subject premises for the bid price of $22,100.

It appeared that petitioner either never made an attempt on his clients' behalf to obtain financing or didn't make a vigorous effort to secure same.

When the Gilberts were unable to raise the necessary funds in order to close, pursuant to the $22,100 purchase price, petitioner offered to loan them at least part of the money.

The Gilberts apparently believed that petitioner would take back a mortgage against the premises for the funds he was to lend them.

Petitioner seized on the opportunity to take his clients over. Mr. and Mrs. Gilbert are unsophisticated, barely literate and decidedly were no match for petitioner's cunning.

On October 29, 1976, petitioner, without explaining to his clients what they were signing and the Gilberts believing that they would be purchasing the house, with petitioner taking back a mortgage against the premises for funds he would loan them, caused his clients to execute an assignment of contract, from the Public Administrator to JPJ Contractors, Inc., a corporation in which petitioner was an officer, namely, secretary, and his wife, Jayne Prince, the sole stockholder. On or about October 29,

1976, JPJ purchased the house from the Public Administrator for $22,100. At the closing, petitioner, who represented JPJ as its attorney, submitted a bill to the Public Administrator on behalf of Big Ed Realty Corp., for a brokerage commission in the amount of $1,326, which was paid. Big Ed Realty is another corporation in which petitioner is an officer and his wife a shareholder.

The $1,326 brokerage commission was applied by the Public Administrator in reducing the proceeds available from the sale of the house, in computing the 25% share to be paid to the Gilberts in accord with the settlement. The commission was thereby also in effect being passed on to the Gilberts to pay.

Petitioner's conduct in acting as a real estate broker and attorney in one transaction was also highly unethical. The New York State Bar Association's Committee on Professional Ethics has stated in its opinon #493 [1978] that:

> "Finally, we have held on a number of occasions that a lawyer cannot act in that capacity on behalf of any party to a real estate transaction in which the lawyer or his spouse has acted as broker, because of the possible conflict between the interests of the client and those of the lawyer. N. Y. State 208 [1971], N. Y. State 244, *supra*, N. Y. State 291 [1973], N. Y. State 340 [1974]. We continue to be of that view."

On June 6, 1977, petitioner and his corporation, JPJ, conveyed the premises to the Gilberts. Petitioner represented both sides, without telling the Gilberts that JPJ Contractors, Inc., was even involved, or for that matter anything about said corporation, or its very existence.

The Gilberts apparently believed at this time that they were purchasing the house from the Public Administrator.

The deed was not recorded until October 4, 1977. Mrs. Gilbert thereafter obtained a copy of the deed herself from the County Clerk's office, which is how petitioner's scheme began to be unearthed.

At the closing on June 4, 1977, petitioner had obtained an FHA mortgage for his clients in the sum of $31,850. He maintained that the selling price was approximately $33,250. However, the evidence established that he told his clients as well as the Embanque Capital Corp., the financing company through which the FHA mortgage commitment was issued, that the price was $35,000. The latter figure included a second charge to the Gilberts of the brokerage fee of Big Ed Realty, in the amount of $1,326, it having already been paid by the Public Administrator to Big Ed Realty on or about October 29, 1976. As set forth above, the $1,326 brokerage commission had also been passed on to the Gilberts when the Public Administrator applied it against the Estate, prior to the Gilberts' one-quarter share being computed.

Petitioner also charged his clients, the Gilberts, a legal fee of $300 for the closing on June 4, 1977, in which he represented both sides. In addition, he imposed a usurious interest charge of $1,800 on the $22,100 which his corporation, JPJ Contractors, Inc., had invested for six months. Such charge amounted to an interest rate of approximately 16%, when, by law, the maximum interest rate that could have been charged at the time was 7½% and if, and only if, the banking board so permitted. The applicable provisions are set forth in the New York General Obligations Law § 501 and New York Banking Law §14-a.

Although petitioner advised his clients at or about the time of the closing on June 4, 1977, that the selling price was $35,000, he actually charged them considerably more.

Also, he told them that repairs were necessary to procure the FHA loan. Petitioner arranged for the repair work, through another corporation, PaJohn Management Corp., in which he was an officer, secretary and his wife a stockholder. However, he never submitted a bill to the Gilberts for said repairs. He testified that a bill was prepared in the amount of $7,200 but that it was not supplied to the Gilberts. It appeared doubtful that many of the repairs that were set forth in said bill were ever completed or even done, let alone additional repairs which petitioner testified to. Moreover, the Gilberts testified that many of the repairs that were to have been made were either not done, only partially completed or represented poor workmanship.

The evidence also established that, in addition to the $31,850 mortgage, the Gilberts paid to petitioner $12,650 for the house. Of the latter amount, petitioner acknowledged receipt of same, except as to the sum of $3,586.54 for which the Gilberts had no proof of petitioner's having received from them. However, the $3,586.54 was procured by them in or about October, 1976, in the form of a loan from Citibank. The Gilberts testified that they were given a teller's check for the $3,586.54 from Citibank and that they endorsed same over to petitioner. However, petitioner emphatically denied receipt of same. It was brought out during the trial of the disciplinary proceeding that an effort had been made by respondent to obtain a copy of said check, but that Citibank no longer maintained such records.

It was clear that petitioner perjured himself when he denied receipt of the payment from the Gilberts of $3,586.54 since, among other things, a deposit for the identical amount was reflected in his escrow account on December 8, 1976.

When the cost of the alleged repairs of $7,200 was added to the $22,100 purchase price that the Gilberts should have paid for the house, a total of $29,300 was arrived at. However, the Gilberts actually paid $44,500 ($31,850 plus $12,650) for a net gain to petitioner of approximately $15,000. (When closing costs were considered, it appeared that he probably profited to the extent of at least about $13,000 at the expense of the Gilberts.)

CHARGE TWO.
(Conversion.)

Petitioner was an officer, secretary and his wife at least a majority shareholder in Certisch Construction Corporation.

Some parcels of property which were owned by Certisch were condemned by the City of New York. Madison Heat Corporation, which was represented by George Sassower, Esq., had a mortgage against one or more of the properties.

The condemnation award from the City of New York amounted to approximately $11,000. A settlement was arrived at between Sassower and petitioner, whereby $8,000 was to be paid to Madison Heat Corporation.

Sassower testified that he entered into an agreement with petitioner that the proceeds of the award from the City of New York would be held in escrow by petitioner, pending the payment of said $8,000 settlement.

Sassower memorialized the agreement by sending a letter dated November 21, 1974, to petitioner confirming the aforesaid understanding regarding the holding of the money in escrow.

Petitioner repeatedly insisted in his testimony that there was never an agreement that he hold the money in escrow. However, the evidence established that there was such an understanding and that petitioner again testified falsely.

Indeed, the record showed that on or about February 19, 1975, petitioner deposited $8,000 in his escrow account. Also, on or about February 19, 1975, petitioner forwarded his escrow check in the amount of $7,725, made payable to the order of Sassower and his client, Madison Heat Corporation. Petitioner had deducted $350 for legal fees, offset by a referee's fee of $75 which was to be refunded, leaving a net payment of $7,725, albeit that the settlement was to be for $8,000.

Sassower, who averred that petitioner had no right to deduct a legal fee, promptly returned the check to petitioner and demanded payment of the full $8,000. When petitioner failed to issue a check for $8,000, Madison Heat brought suit against petitioner. Petitioner's corporation, Certisch, then brought suit against Madison and the actions were later consolidated.

In an ensuing appeal, the Appellate Division, Second Department, ruled in *Certisch Construction Corp. v. Madison Heat Corp.*, 56 A. D. 2d 642 (Second Dept. 1977), that petitioner, C. John Prince, was the "escrowee in settlement of the claim." Summary judgment was granted for Madison in the amount of $7,250, "leaving the dispute as to the amount claimed to be due plaintiff Prince to be resolved at the trial."

In *Schuman v. Conforti*, 30 A. D. 2d 968 (Second Dept. 1968), aff'd 26 N.Y. 2d 755 (1970), the Appellate Division stated that a premature disbursement of an escrow fund is incompatible with an escrow agent's "* * * obligation as an impartial trustee of the escrow fund." Also, in *Farago*

v. Burke, 262 N. Y. 229 (1933), the Court of Appeals held that a duty is imposed on the depositary of escrow as a trustee for both parties,

> "* * * not to deliver the escrow to anyone except upon strict compliance with the conditions imposed * * * "

Petitioner's testimony as to what happened to the $8,000 he had in escrow, after Sassower returned the check for $7,725 in or about February, 1975, was highly inconsistent.

He testified that he took the $8,000 out of his escrow account and placed it in a safe deposit box, because of an IRS problem he was having. Petitioner then stated that he didn't know when he withdrew the $8,000 from escrow, but letters set from the IRS, which were in respondent's possession, indicated the time frame. Those letters were dated April 5, 1978 and July 11, 1978.

He then testified that he took the money out of escrow shortly after Sassower returned the check to him for $7,725 in 1975.

Pursuant to the Appellate Division decision in *Certisch, supra,* a trial was held in Supreme Court, Queens County, before Hon. Harold Hyman as to the fee due petitioner, if any. Petitioner testified that the trial took place possibly in 1978. The payment to Madison in accord with a settlement was ultimately made by check dated March 7, 1978, in the amount of $7,725.

When petitioner was questioned as to whether the funds were in escrow at the time of the trial before Justice Hyman he reiterated that, "It was never in escrow."

The fact that he deposited the $8,000 in escrow in 1975 (which funds he testified were withdrawn from Certisch's account), and then redeposited the money into escrow in 1978, just before issuing the check to Madison dated March 7, 1978, corroborated Sassower's testimony as well as the findings of the Appellate Division in *Certisch* that there was an escrow agreement.

Further, in an affidavit prepared by petitioner during the litigation with Madison, he virtually conceded that there had been such an agreement and in a letter he had sent to the Grievance Committee, dated April 10, 1978, in response to the complaint of Sassower, he alleged that the $8,000 was in the "bank at all times," including when he appeared before Justice Hyman and that it was only withdrawn when he had difficulty with the IRS, because he was "fearful of the fact that they might attach the money in that account."

Petitioner's escrow records which were marked in evidence were not consistent with his testimony in the disciplinary proceeding. It was clear that there was an escrow agreement and, as a matter of law, petitioner, as a fiduciary for the funds entrusted to him, breached his duty when he converted the escrow funds and apparently turned them over to Certisch Construction Corporation, of which he was an officer and his wife at least the majority shareholder.

In an April 10, 1978 letter petitioner deliberately attempted to mislead and deceive the Grievance Committee when he stated that the money was only taken out of the bank when he had an IRS problem, which would have been in 1977 or 1978. However, his latter explanation was incredible in view of the fact that, his IRS situation notwithstanding, petitioner left a balance in his escrow account of $10,710.69 on December 21, 1977, at a time when

it was his testimony the IRS problem was ongoing. Moreover, thereafter the balances in the account sometimes exceeded $11,000 and on March 8, 1978, when he issued the escrow check to Madison for $7,725 in settlement, there was $18,384.63 in the escrow account.

Even more damaging to petitioner's deceitful attempt at an explanation was his response to an inquiry as to why he didn't withdraw additional escrow monies that were entrusted to him, in view of the claimed IRS difficulty. He admitted in answering the question that,

> "Why should I take it out. The IRS cannot take money that they know does not belong to me."

Indeed, said response was precisely the point, the IRS could not proceed against escrow. Accordingly, by petitioner's own admission he established that his scenario of what occurred was nothing less than a fairytale.

CHARGE THREE.
(Commingling.)

The evidence established that petitioner, from 1975 forward, maintained a bank account #009-753095 with Marine Midland Bank, entitled "C. John Prince Escrow Acc." in which he commingled clients and personal funds.

Among other things, by his own admission, after having been called as a witness by respondent, he stated that he kept personal funds in his escrow account. Indeed, he testified, that when he opened the account he deposited $3,500 of his own funds, because he stated,

> "I wanted to—I didn't need to."

Commingling is a practice which is strictly proscribed.

DR-9-102(A) of the Lawyer's Code of Professional Responsibility provides as follows:

> "A. *All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:*" (Emphasis supplied.)
>
> "1. Funds, reasonably sufficient to pay back charges may be deposited therein.
>
> "2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved."

Additionally, the Appellate Division, Second Department's Rules Governing the Conduct of Attorneys forbids the commingling of funds.

> "§691.12 Maintenance of Records
>
> "(a) Required maintenance of records by attorneys. An attorney subject to this Part pursuant to the first sentence of section 691.1 of this Part shall maintain in a bank or trust company in his own name, or in the name of a firm of attorneys of which he is a member, or in the name of the attorney or firm of attorneys by whom he is employed, a special account or accounts separate from

> his personal accounts or from any accounts in which assets belonging to his firm are deposited and separate from any accounts which may be maintained in the capacity of executor, guardian, trustee, or receiver, into which special account or accounts of all funds entrusted to such attorney or such firm shall be deposited" (22 NYCRR §691.12[a]).

CHARGE FOUR.
(Failure to Cooperate.)

Petitioner failed to cooperate with the Grievance Committee for the Second and Eleventh Judicial Districts in its legitimate investigation of complaints.

In a letter dated March 17, 1978, sent by the Grievance Committee to petitioner, he was requested to furnish, among other things,

> "copies of each and every monthly statement for your escrow account from December, 1974 to date * * *"

He testified that he furnished everything that he could, but that his office was burglarized and vandalized.

It wasn't until on or about October 25, 1979, one and one-half years after having been requested, that petitioner furnished the Grievance Committee with the statements for his escrow account for the year 1975. He testified that he procured them from his bank.

The latter statements were only submitted at a time subsequent to when petitioner had been served with an order of the Appellate Division, dated June 22, 1979, directing that he comply with a subpoena within ten days

of the service of the order upon him, or be adjudged in contempt of Court.

He also failed to furnish copies of the closing statements in the Gilbert matter by March 16, 1979, although he had been subpoenaed to produce them. Once again, he only furnished those documents after he was served with the aforesaid Appellate Division order directing that he produce the subpoenaed items or be held in contempt of Court.

By failing to furnish the documents he was directed to produce, petitioner violated the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department.

> "§691.12
>
> "(b) Required bookeeping records. All such attorneys and firms of attorneys shall maintain for seven years after the events which they record.
>
> "(1) The records of all deposits in and withdrawals from the accounts specified in subdivision (a) of this section and of any other bank account which concerns or affects their practice of law;
>
> "(2) a ledger book or similar record for all special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds were held, the amount of such funds, the charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed;
>
> "(3) copies of all retainer and compensation agreements with clients;

"(4) copies of all statements to clients showing the disbursements of funds to them or on their behalf;

"(5) copies of all bills rendered to clients; and

"(6) copies of all records showing payment to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed.

"All such attorneys and firms of attorneys shall make accurate entries of all financial transactions in their record of receipts and disbursements, in their special accounts, in their ledger books and similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

* * *

"(d) Availability of records. Any of the records required to be kept by this section shall be produced in response to a subpoena *duces tecum* issued in connection with a complaint or investigation pending before a committee appointed pursuant to section 691.4 (a) of this Part or shall be produced at the direction of this court before any person designated by it. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

"(e) Disciplinary action. Any attorney who does not maintain and keep or cause to be maintained

and kept the accounts and records as specified and required by this section, or who does not produce any such records pursuant to this Part, shall be subject to disciplinary proceedings" (22 N.Y.C.R.R. §691.12[a]).

POINT ONE.

Petitioner's constitutional rights were not abridged by calling him as a witness.

Petitioner's claim that he was forced to incriminate himself by being called as a witness by respondent is frivolous and absurd.

Attorney disciplinary proceedings are not criminal in nature, *Matter of Ungar*, 27 A. D. 2d 925 (1st Dept. mem. 1967), lv. to app. denied 20 N. Y. 2d 642, cert. den. 389 U. S. 1007 (1967); *In re Anonymous*, 41 N. Y. 2d 506, 508-509 (1977), and have generally been held to be civil proceedings, *Matter of Zuckerman*, 20 N. Y. 2d 430, 438 (1967), cert. den. 390 U. S. 925 (1968).

Since these are not criminal proceedings, respondent was entitled to call petitioner as a witness in this non-jury trial before a referee, once petitioner had indicated he was not going to testify. Of course, however, petitioner, who was represented during the trial of the disciplinary proceeding by an able attorney, Robert E. Green, Esq., who is a trial attorney practicing almost exclusively in the area of criminal law, could have invoked his Fifth Amendment rights as to any and/or all questions asked of him by respondent's counsel. His decision not to do so was strictly within his province.

In a disciplinary proceeding, the failure of the attorney to testify on his own behalf can result in an adverse inference being drawn. See, *Baxter v. Palmigiano*, 425 U. S.

308, 316-320, which involved a prison disciplinary proceeding. See also, *Marine Midland Bank v. Russo, et al.*, 50 N. Y. 2d 31 (1980), and *Matter of Randel*, 158 N. Y. 216, 219 (1899).

POINT TWO.

The claim of a conflict of interests resulting in a deprivation of constitutional rights is meritless.

Counsel to respondent did not bring the charges against petitioner, the respondent Grievance Committee brought said charges. On respondent's direct case as to Charges Three and Four, namely Commingling and Failure to Cooperate, documents were marked in evidence establishing those allegations. Petitioner, who was then called as a witness as described above, made certain admissions while under inquiry, further coorborating that evidence.

Petitioner's purported contention that counsel to respondent was a complainant in the disciplinary proceeding is a ludicrous assertion which reflects either a thorough lack of understanding as to what transpired during the disciplinary proceeding and/or a final gasp to frame some kind of argument, spurious though it may be.

The claim that the referee, W. Bernard Richland, Esq., an eminent lawyer and former Corporation Counsel of the City of New York, has been guilty of a conflict of interest is absurd. The issue in the pertinent charge was whether petitioner had converted escrow funds. The involvement of the Corporation Counsel's office, an enormous entity of which the referee was at one time in charge, purely served as background and was raised only for foundation purposes at the hearing of the disciplinary proceeding to properly elicit the testimony and documentary proof on the sole question concerned as to the escrow funds.

Contrary to petitioner's baseless representation, nowhere in the record was there any indication that the referee was biased. Indeed, if there had hypothetically been any justification for prejudice by the referee, it would have been against Sassower, the witness called by respondent, and not as to petitioner. Moreover, there is not even a suggestion by petitioner that prior to this proceeding the referee had even the remotest personal contact with either he or Sassower.

POINT THREE.

There is no basis for certiorari to be granted.

The preposterous "Reasons Why the Petition for a Writ of Certiorari Should Be Granted," given by petitioner, do not even warrant a response except to point out that his characterization of himself *vis-a-vis* the Grievance Committee are belied not only by the evidence adduced during the disciplinary proceeding but by his recent conviction, which is a matter of public record, of two crimes. Arising out of circumstances independent of those which were the subject of these proceedings, petitioner was convicted in the Supreme Court of the State of New York, County of Queens, on April 9, 1981, of two Class A misdemeanors; namely, two counts of Fraudulent Disposition of mortgaged property pursuant to §185.10 of the New York Penal Law.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated: Brooklyn, New York,
September 23, 1981

Respectfully submitted,

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